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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. A-567

OCTOBER TERM, 1979

HARRY M. BORCHERDING, et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DUDLEY, FATTERSON,
MAXWELL, SMITH & KELLY, P.C.
Marilyn Jean Kelly
Attorneys for Petitioners
2655 Woodward Ave. Suite 275
Bloomfield Hills, Michigan 48013
(313) 334-0562

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IN THE
SUPREME COURT OF THE UNITED STATES
October term, 1979

HARRY M. BORCHERDING, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioners, Harry M. Borcherding and the Institute of Computer Technology, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 31, 1979.

OPINION BELOW

Appearing in the Appendix hereto are the opinions of the Court of Appeals, not yet reported, affirming the district court and denying petitioners' petition for rehearing, and the opinions and orders of the district court, not reported, denying petitioners' motion for judgment of

acquittal and new trial and motion for reconsideration.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 31, 1979, affirming petitioners' conviction dated June 26, 1978. The Court of Appeals denied a timely petition for rehearing on December 3, 1979. On January 2, 1980, Mr. Justice Stewart signed an order extending the time for filing this petition for certiorari to and including February 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 22(2) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether error in this criminal trial occasioned by the admission of evidence barred by Rule 608(b) of the Federal Rules of Evidence is subject to the harmless error standard of Rule 52 of the Federal Rules of Criminal Procedure.
2. Whether the error found by the Court of Appeals to have occurred during the trial of this matter affected the substantial rights of the petitioners.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Evidence, Rule 608

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Federal Rules of Criminal Procedure, Rule 52

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

Petitioners have been convicted of four counts of making false statements to a governmental agency under 18 U.S.C. §1001.

Petitioner, Institute of Computer Technology ("ICT") is a for-profit institute of higher education licensed and operating in the State of Michigan prior to conviction. At all times relevent to the issues herein, ICT was accredited by the National Association of Trade and Technical Schools to teach data processing and computer programming. Petitioner Harry M. Borcherding ("Mr. Borcherding") was and is the president and sole stockholder of the school.

As of the date of this petition, ICT has lost all government funding, has been stripped of its national accreditation and state licensure, and has virtually gone out of business. The trial court has ordered it to pay $20,000.00 fines, and in a companion civil action, it has been assessed damages of $786,206.00 double damages plus statutory forfeitures. Mr. Borcherding, 46 years of age and never before convicted of a crime, personally shares the financial liability imposed on ICT and is commencing three years imprisonment.

The false statements for which petitioners were convicted were made to auditors

from the Department of Health, Education and Welfare on May 20 and 21 and on August 28, 1975. At that time, the auditors were undertaking a special investigation of the books and records of ICT in cooperation with the Department of Justice. The examination was made supposedly for the purpose of verifying eligibility of students at ICT to receive government monies under the Basic Educational Opportunity Grant Program of the Higher Education Act, 20 U.S.C. §1070 et seq. ("BEOG").

The essence of the charges against petitioners was that certain isolated classes at the school during the first six months of 1975 met an inadequate number of hours per week to satisfy the Office of Education rules and regulations under the BEOG program. A serious fact question was presented by Mr. Borcherding as to whether petitioners had actual knowledge of the BEOG rules and regulations and of the interpretation given them by the Office of Education.

At trial, the government called as its last witness Zenon Losin, former administrative assistant to Mr. Borcher-

ding and a key executive employee of ICT throughout the period involved in this controversy. (App. 288-291*) Mr. Losin, 27 years of age, appeared under a grant of immunity from prosecution. (App. 289, 302-303) His testimony occupies almost 200 pages of transcript. (App. 288-486)

He gave testimony tending to show that the government attorneys had caused confusion as to what regulations ICT had at the time of making the alleged false statements, and his testimony had been the only direct evidence on this issue.

Under cross-examination, Mr. Losin contradicted his testimony. Also, the petitioners were able to elicit from him certain comments favorable to the character of Mr. Borcherding, e.g. he was technically competent in computer technology, a hard worker and a demanding boss. (App. 405-407) Toward the end of redirect examination, counsel for the government paused to make an offer of proof in the absence of the jury request-

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*Reference is to the record as found in the joint appendix of the parties which was filed with the Sixth Circuit Court of Appeals.

ing admission of the following specific instance of conduct on the part of Mr. Losin:

> ". . .(O)n a particular occasion there was present at the school individuals from the National Association of Trade and Technical Schools, and during that particular visit he (Zenon Losin) was aware that those people were in the office, and they had certain papers spread out in that office and was interested in what they were, and while the people were out of the building, he went into the office to look at those papers, but didn't see them at that time, and then proceeded to open a briefcase or briefcases of those individuals, and removed some papers from them, and bringing them to Mr. Borcherding's attention, and that thereafter he had a discussion with Mr. Borcherding concerning those papers, and it was agreed that it would be a good idea to have those, and Mr. Losin made copies of those papers while Mr. Borcherding watched out of the window to see if those people were coming back, made the

copies, and gave them to Mr. Borcherding who left the school to go back to read those at another place,. . ." (App. 458-460)

The incident was offered by the government to attack the character of Mr. Borcherding.

The trial court at first ruled the testimony admissible as being relative to the manner in which Mr. Borcherding conducted the school. However, upon further inquiry, it was determined that the incident had not taken place until October 31, 1975, a period considerably after the occurrence of any of the acts alleged in the indictment. At that point the court ruled the incident inadmissible.

The government continued to urge admissibility for the purpose of rebutting the witness' testimony as to Mr. Borcherding's good character. The court, after repeating its decision, abruptly reversed itself and admitted the incident on altogether different grounds not advanced by either party - as evidence of the character of the witness. No effort was made to weigh the relative prejudice to petitioners. (App. 458-468) The incident in full was put before the jury.

The Sixth Circuit Court of Appeals found error, noting:

"This testimony was arguably admissible under Rule 608(b) of the Federal Rules of Evidence to show the character of the testifying witness. However, the government did not limit the inquiry to Mr. Losin's involvement in the escapade. Instead, the government went on to elicit testimony concerning the defendant Borcherding's involvement in and approval of the episode. Losin testified that Borcherding had approved the idea, and had acted as a lookout while Losin was making the copies.

Although we believe that the admission of this testimony concerning Borcherding's involvement in past wrongdoings was error, we find that in light of the overwhelming evidence of guilt adduced at trial, any error is harmless. Rule 52, Federal Rules of Criminal Procedure."

REASONS FOR GRANTING THE WRIT

1. ***THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE APPLICATION OF LAW BY THE SIXTH CIRCUIT IN UNITED STATES v. McFADYEN-SNIDER***

Three years ago in United States v. McFadyen-Snider 552 F2d 1178, the Sixth Circuit found error in the trial of Heather McFayden-Snider ("Heather"), because of the admission of evidence of prior misdeeds on her part for which she had not been charged. The appeals court applied the standard for error set forth in Chapman v. California 286 U.S.18,24,87 S.Ct.824, 17 L.Ed.2d 705 (1967), found the errors not harmless beyond a reasonable doubt, and reversed the conviction. This Court denied certiorari, 98 S.Ct.1647.

In the case at bar, similarly, prior misconduct by petitioner Harry M. Borcherding was found by the same appeals court to have been erroneously admitted at trial, but here the court applied the far more lenient standard for error of Rule 52 of the Federal Rules of Criminal Procedure, found the error did not affect the substantial rights of the appellants, and affirmed the conviction.

It is encumbent on this Honorable Court to consider and resolve this inconsistency in application of standards for judging reversible error.

A brief comparison of the facts and findings of error in the two cases will illustrate their singular parallels and the conflict manifest in their ultimate dispositions.

Both cases were tried to a jury. Heather was convicted of wire and mail fraud and of making a false financial statement to a bank. Mr. Borcherding was convicted of making false statements to the government.

Two government witnesses testified as rebuttal witnesses against Heather accusing her of past sexual misconduct. In reversing, the appeals court labeled the testimony irrelevant and prejucicial, observing:

> "The evidence rebutted nothing; (Heather) did not testify she had been a good moral person." at 1182.

In the case at bar, Mr. Borcherding did not testify at all. Yet, the Zenon Losin incident was presented to the trial court initially as admissible to rebut the character of Mr. Borcherding. (App. 459, 467)

In McFayden-Snider, the appeals court noted that the effect of the erroneously admitted testimony was to impeach Heather's character by her sexual conduct, which conduct was totally immaterial to credibility. The Zenon Losin incident in the case at bar also involved conduct not material to credibility for truthfulness. United States v. Smith 551 F2d.348 (D.C.Cir.1976)

In both trials, the erroneously admitted evidence of prior misconduct may be properly described as it was in McFayden-Snider as prosecutorial overkill.

> "This evidence added nothing to the prosecutor's case and served only to cater to the passions of the jury. It tended to put (Heather) on trial for conduct not in the indictment and prejudiced her chance for a fair trial." McFayden-Snider at 1182

In McFayden-Snider two government witnesses testified that Heather had passed bad checks prior to the bad check incidents charged in the indictment. Heather claimed on appeal that the testimony concerning these bad checks denied her a fair trial. She argued that it was unrelated to the

charges against her. The government, on the other hand, responded that its questions to its witnesses were relevant to show their bias or ill feelings toward Heather. Interestingly, in its briefs in opposition to petitioners' Motion for New Trial alleging error in admission of the Zenon Losin incident, the government made the same argument, (Brief in Opposition,pp.15-17) and the trial court adopted it in its Opinion and Order Denying Motion. (This appendix A.16) In McFayden-Snider the appeals court handled that argument as follows:

> "Ladner and Landrum were government witnesses. It is not understandable why the government would want to prove its own witnesses were biased. The real reason the prosecution offered the testimony was to get before the jury incompetent and inadmissible evidence which was highly prejudicial and which deprived (Heather) of a fair trial." at 1183

The appeals court concluded:

> "The contested evidence of bad checks to others tended to put (Heather) on trial for her prior misconduct, for which she was not charged. This

evidence did not merely imply that (Heather) was a party to other mischief, but rather it directly imputed to her other bad acts that were not necessary to prove the prosecutor's case, and thus the evidence was prejudicial to her right to a fair trial. ...
The testimony concerning Heather's prostitution and repeated introduction of evidence of Heather's writing of bad checks independently are reversible error. Although the evidence as to the bad checks is a closer question, this Court is of the opinion that these errors were not harmless beyond a reasonable doubt. Chapman v. California" (cite omitted and emphasis added.) At 1184

In the interest of even-handed application of justice and by reason of the above similarities and parallelisms in McFayden-Snider and in the case at bar, the same standard for reversal should be applied to errors in admission at trial of prior misconduct on the part of the defendants in both cases. This conflict justifies the grant of certiorari to review the judgment below.

2. *THE DECISION BELOW CONSTITUTED A DENIAL OF PETITIONERS' RIGHT TO A FAIR TRIAL.*

The case at bar, if not reversed, will stand for the proposition that in a criminal case tried before a jury, prior misconduct on the part of the accused not related to the offenses charged may be erroneously admitted over objection without affecting a substantial right of that party. It is an invitation to abuse by overly eager or overzealous prosecutors.

In this case, a specific instance of misconduct of a witness and of the defendant was admitted at trial contrary to every proscription of Rule 608(b) of the Federal Rules of Evidence: it was entered on redirect not on cross-examination; it was not probative of truthfulness or untruthfulness of the witness or of Mr.Borcherding; and its admission involved no discretionary weighing by the trial judge as to its prejudicial effect on the petitioners. (App. 458-468)

It further violated FRE Rule 404 in that it tended to show bad character of the accused although he never took the stand. It had nothing to do with the accused's motive, opportunity, interest, pre-

paration, plan, knowledge, identity or absence of mistake or accident. It was offered by the prosecution to impeach its own witness allegedly because of certain testimony elicited on cross-examination of that witness. Although that cross-examination by Mr. Borcherding acting in pro per exceeded the scope of direct, the prosecution had made no objection to the scope, then sought to capitalize on it by offering the highly prejudicial Zenon Losin incident.

Moreover, that aspect of the incident which damaged Mr. Borcherding did not slip in by inadvertence; it was anticipated and planned by the prosecution. See offer of proof, App.458-459.

The importance to this Honorable Court of the affirmation of conviction in this case must be that it provided a particularly egregious precedent for future defenses of prosecutorial overkill as well as a whittling away of the impact of Rule 608(b), neither of which can be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and decision of the Sixth Circuit.

Respectfully submitted,

MARILYN JEAN KELLY

2655 Woodward Avenue, Ste 275
Bloomfield Hills, Michigan
Counsel for Petitioners

February 1, 1980

APPENDIX

79-5032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ORDER

HARRY M. BORCHERDING and the INSTITUTE OF COMPUTER TECHNOLOGY, INC.,

Defendants-Appellants

_____/

Before: WEICK, LIVELY and ENGEL, Circuit Judges

Defendants Harry M. Borcherding and the Institute of Computer Technology ("ICT") appeal from a jury conviction for making false statements to auditors from the Department of Health, Education and Welfare in violation of 18 U.S.C. §1001. Although numerous issues were raised on appeal, the only significant question presented concerned the trial court's ruling admitting certain testimony into evidence.

The defendants argue that the trial court erred in allowing the government to introduce testimony implicating defendant Borcherding in wrongful activity unconnected with the crime being charged. On re-direct examination of its witness Mr.

Losin, the government elicited testimony to the effect that Losin, a former employee of ICT, had surreptitiously removed papers from the briefcases of representatives of the National Association of Trade and Technical Schools who were visiting ICT. Losin testified that he copied the papers and subsequently returned the originals to the briefcases. This testimony was arguably admissible under Rule 608(b) of the Federal Rules of Evidence to show the character of the testifying witness. However, the government did not limit the inquiry to Mr. Losin's involvement in the escapade. Instead, the government went on to elicit testimony concerning the defendant Borcherding's involvement in and approval of the episode. Losin testified that Borcherding had approved the idea, and had acted as a lookout while Losin was making the copies.

Although we believe that the admission of this testimony concerning Borcherding's involvement in past wrongdoing was error, we find that in light of the overwhelming evidence of guilt adduced at trial, any error is harmless. Rule 52(a) Federal Rules of Criminal Procedure.

Therefore,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

s/ JOHN P. HEHMAN
Clerk

October 31, 1979

79-5032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. ORDER

HARRY M. BORCHERDING and THE INSTITUTE OF COMPUTER TECHNOLOGY, INC.,

Defendants-Appellants

_____/

Bevore: WEICK, LIVELY and ENGEL, Circuit Judges

Appellants' motion for leave to file a petition for rehearing out of time is hereby granted.

Upon consideration of the petition for rehearing, it appears that it is nothing more than a rehash of arguments already fully presented to the court by appellants and already fully considered by the court. Accordingly,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

s/ JOHN P. HEHMAN
Clerk

December 3, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs- CR.NO. 8-80019

HARRY M. BORCHERDING and INSTITUTE OF COMPUTER TECHNOLOGY, INCORPORATED,

Defendants

_____/

OPINION AND ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

Defendants, HARRY M. BORCHERDING and THE INSTITUTE OF COMPUTER TECHNOLOGY, were indicted on January 9, 1978 on four counts each of violating 18 U.S.C. §§ 1001, 1002. Count I of that indictment states that the defendants made a knowing and willful false statement that classes in the Data Librarian course offered by the Institute met five hours a day, five days a week for four weeks; however, those classes met less than and were scheduled to meet less than twenty-four hours a week. Count II makes a similar allegation as to the Data Control Clerk course. Count III alleges that the defendants gave auditors from HEW a false attendance sheet for the Data

Librarian class which showed that class meeting from 8:30 to 1:30, although it was scheduled to meet and did meet less than twenty-four hours a week. Count IV alleges that on August 28, 1978, the defendants gave a false computer printout to auditors from HEW showing incorrect total hours for the Data Librarian, Data Control Clerk, and Console Operators classes. A jury found both defendants guilty of all four counts on June 26, 1978.

The defendant, HARRY M. BORCHERDING, now moves this Court for a judgment of acquittal or in the alternative for a new trial or in the alternative for an arrest of judgment. The Federal Rules of Criminal Procedure allow a judgment of acquittal to be entered if a motion is made or renewed in seven days after the jury is discharged or in such further time as the court may fix within that period. F.R. Crim. P. 29. The court may grant such a motion if there is insufficient evidence offered to sustain a conviction. The rules further provide for a new trial under similar procedure if required by the interests of justice. F.R. Crim. P. 33. Finally, the rules allow an

arrest of judgment if the indictment does not charge an offense and a motion is made within seven days after verdict or within such time as the court sets within the seven days. F.R. Crim. P. 34.

The defendant asserts several grounds upon which he is entitled to relief. He urges specifically that there were insufficient facts to constitute an offense against the United States; that the verdict was contrary to the weight of the evidence and was not supported by substantial evidence; that it was error to deny the defendant's motion for acquittal; that it was error to admit the testimony of Zenon Losin as to certain matters; that it was error to admit testimony on payments to Delcoa, to admit evidence of an injunctive order, and to admit testimony on interest-bearing commercial paper. The Government opposes the motion and further states that this Court is without jurisdiction to consider the motion since, they contend, it was not timely filed.

INSUFFICIENT FACTS TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES

The defendant argues that there were insufficient facts to constitute an off-

ense against the United States in that there was no authority in the Commissioner of Education to promulgate the regulations which the defendant was convicted of violating. According to the defendant, it was the intent of Congress to allow each institution to define who should be a full-time student. There is no evidence that the statute was intended to be read as the defendant suggests. The act does expressly permit an institution to make the threshold determination of who is a student in good standing. 20 U.S.C. § 1070a(a)(1). However, the act does not give authority to an institution to determine otherwise the extent of a student's eligibility to receive a grant. It is only logical to place decisions as to standards and qualifications in the hands of the Commissioner who alone can administer the program in an evenhanded manner. This Court cannot conclude it was the intent of Congress to have taken the novel step of entrusting this determination to each institution without more clearly expressed authorization in the act.

Furthermore, the act makes manifest that it was the intent of Congress to

give the Commissioner plenary power to carry out the program in such a way as to achieve the act's purposes. 20 U.S.C. § 1070(b). That same section provides that one of the act's purposes was to provide grants to "eligible students." 20 U.S.C. § 1070(a)(1). It therefore follows that the Commissioner was empowered to ascertain who were eligible students. This power is also implicit in the act's requirement that payments be reduced to those who were less than fulltime students. See 20 U.S.C. § 1070a(a)(2)(A)(ii).

The regulations for the program, as promulgated pursuant to § 553(c) of the Administrative Procedure Act providing for publication, notice, and comment, discuss at length the question of what should constitute a clock hour--one of the measures of a program's eligibility. The defendant had in his possession a copy of the regulations (Exhibit 1) and must therefore have been apprised both of the Department's definition and that his program did not conform. On his application to participate in the program, (Exhibit 5), the defendant stated that his school was one that measured student status in terms

of clock hours. His having done so strongly suggests that he was on notice and can be presumed to have had knowledge of the meaning of clock hours.

The defendant nevertheless contends that he complied with the spirit of the regulations defining clock hours and employs an algebraic formula to support his contention. The defendant's proposed definition is tortured and does not comport with the normal understanding of the language of the regulation.[1] There is a substantial difference in a class that meets twenty-four times as opposed to one that meets only twenty or fewer times, however equivalent the total hours may be. Furthermore, had the defendant believed that his interpretation of the requirements was correct, surely he would have entered that figure rather than twenty-five hours--not clock hours--on his application to the Department. The defendant's own actions indicate that he did know the intent of the regulations and that his behavior was not in conformity.

Finally, the defendant contends that the indictment as drafted was fatally insufficient. The Federal Rules of Criminal

Procedure provide that an indictment is to "be a plain, concise and definite statement of the essential facts constituting the offense charged." F.R. Crim. P. 7(c)(1). The Sixth Circuit Court of Appeals has stated:

> The indictment serves to notify a defendant of what he is called upon to defend, and its adequacy is determined by the statement of the facts constituting the offense.

United States v. West, 562 F. 2d 375, 378-79 (6th Cir. 1977). It appears to the Court that the indictment does serve to put the defendant on notice of the events in issue at the trial and of the defense which he must have been prepared to mount. Therefore, the defendant can not complain of the adequacy of the indictment as it was handed down by the Grand Jury.

1/ It should be added that the Court did instruct the jury on the defendant's theory as to the requirements he had to meet. They evidently found that there was inadequate evidence to support that theory and instead believed the testimony of Diane Sedicum, an employee of the Department of Health, Education and Welfare.

VERDICT CONTRARY TO THE WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The defendant next contends that the materiality of the statements charged in the indictment was not proven in that the giving of false attendance sheets had no ability to change the course of the audit. The defendant, however, misinterprets the meaning of materiality in this case. First, the question was not only the materiality of the false statements with regard to their potential to affect the actions of the Department of Education audit team's techniques. In addition the indictment is concerned with the statements' natural effect on actions of the Department in seeking to recoup the money once they had the results of the audit.

Furthermore, as a result of the special circumstances of the case, the Court determined in an abundance of caution to treat materiality as a question of fact and submit it to the jury. Cf. United States v. Giacalone, No. 78-5152 (6th Cir. Nov. 6, 1978). In his brief, the defendant does attempt to raise questions concerning the substantiality of

the facts in support of the statements' materiality. However, the jury was charged to determine this question and was accordingly instructed on the meaning of materiality. It follows that the jurors determined that this element was proven beyond a reasonable doubt, and a review of the record indicates that there was adequate evidence to support such a determination. Further this court finds that the statements are material as a matter of law.

The only evidence on the question of materiality was the testimony of Diane Sedicum that if it were determined that the Institute of Computer Technology was not entitled to the funds, the Department would seek their return. There is no evidence to the contrary that would allow any other conclusion to be drawn. In addition, there is evidence that the defendant himself believed the statements to be material. The preparation of false records was done with the purpose and intent of deceiving the Department and avoiding the return of funds advanced. It must be inferred that the defendant believed his actions to be material.

TESTIMONY OF ZENON LOSIN

The defendant states that it was error for the Court to have admitted the testimony of Zenon Lozin concerning certain actions taken by the defendant during a visit by representatives from the National Association of Trade and Technical Schools. The defendant advances several grounds on which he believes the Court committed error. First, he contends that it was improper for the Government to have impeached this witness whom they had called in their own case. The Federal Rules of Evidence, unlike the common law, allow the impeachment of a witness by any party. F.R. Evid. 607. Thus, a party can no longer be said to vouch for the veracity of its own witnesses.

The defendant next contends that it was improper to impeach the witness on redirect examination by specific acts evidence. It is true that the rules do provide that specific acts may be enquired into only on cross-examination. F.R. Evid. 608(b). However, in this case, the defendant was permitted by the Court to conduct a wide-ranging examination of the

witness that far exceeded the scope of the direct. (See, e.g., Tr. June 13, 1978, at 152-55; Tr. June 14, 1978, at 20: "I don't think that there has been any testimony of the witness to this point."; Tr. June 14, 1978, at 52, et. seq.; Tr. June 14, 1978, at 88, et. seq.) The Federal Rules of Evidence provide that in such a case, cross-examination which is in essence direct examination becomes in fact a direct examination with the consequences attendant upon such a classification. F.R. Evid. 611(b) (See also Notes by the Advisory Committee). The defendant himself opened up the possibility of the witness' being treated as though he were on cross-examination when the Government began its redirect.

Furthermore, the federal rules make clear that questions of the weight to be given a witness' testimony are material in any case, particularly when they go to the question of his or her veracity. The defendant conducted an extensive enquiry into the witness' motivation for testifying as he did. The tenor of that examination was that the witness was predisposed through fear of criminal prosecution to testify in favor of the Government and,

therefore, to shade his testimony. The defendant enquired into the government's offer of immunity to Zenon Losin, as well as the witness' fears. He also attempted to suggest that the Government had induced certain testimony during Mr. Losin's visits with Government attorneys. In order to rebut the inference of bias and to allow the jury to asses the witness' credibility, the Government properly introduced evidence that showed the witness' strong partiality for the defendant. The Court allowed the testimony with a limiting instruction to the jury and later cautioned the jurors again during final instructions. The Court gave other instructions that the jury should consider bias when it was weighing testimony. Under these circumstances, the evidence was properly admitted on the material issue of the witness' truthfulness and bias.

The defendant asserts that the Sixth Circuit Court of Appeals has ruled that in a similar case such evidence was improperly admitted, citing Unites States v. McFayden-Snider, 552 F. 2d 1178 (6th Cir. 1977). The case is inapposite.

There, the court had improperly admitted evidence under F.R. Evid. 404(b) and, more important, had admitted the evidence without a cautionary instruction. Neither circumstance applies to the present case.

Finally, the defendant contends that the witness' testimony was improperly admitted since it was proved by extrinsic evidence. The defendant apparently has confused extrinsic evidence with collateral issues and the evidence which can be used to prove them. Extrinsic evidence is not evidence of events which are not essential to the issue at trial. Rather it is evidence other than that proven out of the witness' own mouth. In this case, the question of the use of extrinsic evidence is not an issue, since it was the witness' own testimony that put the events into evidence. Furthermore, in this case the evidence went to the weight of the witness' testimony, which is always a material issue at trial. Therefore, it is the Court's opinion that the evidence of misconduct was properly admitted to impeach Mr. Losin.

TESTIMONY ON PAYMENTS OF DELCOA, ON THE INTEREST-BEARING NOTE, AND ON THE INJUNCTIVE ORDER

The defendant also alleges error in the evidence admitted on the use to which part of the funds were put. The defendant objects specifically to evidence of payments to Delcoa, the existence of an interest-bearing note, and of an injunctive order. The evidence was admitted as relevant to the defendant's motivation to falsify records and in order to make the defendant's actions comprehensible by providing them with a context. The defendant believes that the Court committed error in that the evidence was cumulative on the question of intent, that its prejudicial impact far outweighed its relevance, and that intent was never to dispute.

The testimony was relevant on several points. First, it indicated that the defendant's statements to Serge White that the school needed the payments because of immediate financial needs were untrue. The fact that the funds were employed in part to prepay a mortgage for nearly a year and to buy a $100,000 note

suggests that there was no pressing need for the money. Considering this state of affairs, it would follow that the defendant would seek to make the funds as inaccessible as possible in order to prevent their return. These are important considerations that make the defendant's contention that intent was not an issue disingenuous. This is particularly true, considering that earlier he argued that he did not intend to violate the regulations. On the other hand, although this evidence is relevant and probative on the question of motive to falsify, it is difficult to understand why the defendant believes that evidence of the purchase of a note and the payment of a mortgage, in and of themselves innocent acts, should be regarded as highly prejudicial or prejudicial at all.

The injunctive order is a very important element in the Government's case to support a conviction for Count IV. It is difficult to comprehend how this evidence can be considered cumulative when it is the only evidence offered on motive and intent, and indeed no other evidence could have been offered to provide this

essential link in the Government's case. Furthermore, although the defendant characterizes its admission as prejudicial, he does not specify in what way it prejudices him, and the Court is unable to understand how prejudice can have resulted. In the Court's opinion, admission of these items into evidence was not error since they are more probative than prejudicial on material issues in the case.

DENIAL OF MOTION FOR ACQUITTAL

Finally the defendant contends that the Court committed error in its denial of his motion for acquittal. A review of the record demonstrates that there is evidence to support the elements of the crime charged and to justify the verdict returned by the jury. This was the Court's considered judgment at the time of trial, and a review of the record supports that decision.

GOVERNMENT'S CONTENTION THAT THE COURT LACKS JURISDICTION

The Government argues that this Court is without jurisdiction to consider the merits of defendant's motions since they were not filed within the period provided for in F.R. Crim. P. 29, 33,

and 34. After the jury returned its veridict of guilty on all counts on June 26, 1978, the defendant made a timely motion for a thirty-day extension in which to file posttrial motions. The Court granted that extension on June 30, 1978. Thereafter, on July 25, 1978, the defendant filed a second motion for an extension of time, which the Court granted, extending the time to September 20, 1978. The defendant's attorney then mailed the motions on September 20, 1978, and they were received and filed with the Court on September 22, 1978, two days after the extension granted by the Court had passed.

The Government contends that the defendant's motions are untimely since they were filed two days after the final extension set by the Court had ended. Rules 29, 33 and 34 require that a motion for judgment of acquittal, motion for new trial and motion for arrest of judgment must be "made" within a specified period, rather than using the more specific terms "served" or "filed." Neither the Rules of Criminal Procedure nor the Rules of Civil Procedure define the word "made."

The Court has been unable to find any authority that defines the term "made" as used in the Federal Rules of Criminal Procedure. Rules 45(d), 47, and 49, read with Rules 29, 33, and 34, suggest that when service is made within the required period, and the motion is thereafter promptly filed as here, the motion was not untimely "made." The only case in which the Sixth Circuit Court of Appeals deals with this question explicitly is a civil case, which holds that "made" means served, not filed. Keohane v. Swarco, Inc., 320 F.2d 429 (6th Cir. 1963); accord, Allen v. Ault, 564 F.2d 1198 (5th Cir. 1977).

On the other hand, without discussing the specific language, or considering whether the word "made" means something other than "filed" the Sixth Circuit Court of Appeals has stated that criminal motions must be filed within the time period provided in the rules and has not allowed any further time, even when the elapsed time was very small. See, e.g., Collier v. United States, 360 U.S. 284 (6th Cir. 1965), rev'd on other grounds, 384 U.S. 59 (1966); United States v. DeRocco, 320 F.2d 57 (6th Cir. 1963);

see also Collier v. United States, 384 U.S. 59, 60 (1966)(per curiam).

However, it is not clear that the Courts would have so held had they been confronted with the question directly. Furthermore, the Supreme Court has cautioned that the rules of criminal procedure should not be construed to unnecessarily contract the time available. 384 U.S. at 61-62. Since the Court is without direct authority on the question and since the motions were arguably "made" within the time allowed, i.e. they were served within that time and were promptly filed following service, the Court finds that it does have jurisdiction to consider the motions on their merits.

For the reasons stated in the opinion, the defendant's motion for a new trial is DENIED. The motion for judgment of acquittal is DENIED. The motion for an arrest of judgment is DENIED.

s/ CORNELIA G. KENNEDY
CORNELIA G. KENNEDY
Chief United States
District Judge

Dated: Nov. 28, 1978
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

HARRY M. BORCHERDING and
INSTITUTE OF COMPUTER
TECHNOLOGY,

Defendants.

Crim.No. 78-80019

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the defendants' Motion for Reconsideration and being of the opinion that no new grounds have been presented as to why this Court should enter a judgment of acquittal, set aside the jury's verdict, or grant a new trial,

IT IS ORDERED that the defendants' Motion for Reconsideration be DENIED.

s/CORNELIA G. KENNEDY
CORNELIA G. KENNEDY
Chief United States
District Judge

Dated: December 11, 1978
Detroit, Michigan